State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Hinsdale School District Complainant v. Hinsdale Federation of Teachers/NEA-NH Respondent	*	Case No: T-0386-8 Decision No. 2005-064

APPEARANCES

Representing the Hinsdale School District:

Margaret-Ann Moran, Esquire, Upton & Hatfield, LLP

Representing the Hinsdale of Teachers/NEA-NH

Mary E. Gaul, UniServ Director, NEA-NH

BACKGROUND

The Hinsdale School District (hereinafter "the District") filed an unfair labor practice complaint on November 4, 2004 alleging that the Hinsdale Federation of Teachers, NEA-New Hampshire (hereinafter "Federation") committed an unfair labor practice in violation of RSA 273-A:5 II (f) by attempting to arbitrate a grievance that is non-arbitrable under the parties' collective bargaining agreement (CBA) regarding involuntary teacher re-assignments. The District asserts that the parties' CBA provides that the re-assignment of teachers is not subject to the grievance and arbitration provisions. The District initially requested the PELRB to issue an ex parte temporary cease and desist order, pursuant to RSA 273-A:6, III, but subsequently withdrew that request on November 8, 2004. Also, the parties entered into an agreement that allowed them to bifurcate the issue of arbitrability from the merits before the arbitrator. That

agreement allowed either or both of them to pursue their rights regarding arbitrability before the PELRB following a decision of the arbitrator to whom they conditionally assigned the authority to determine the question of arbitrability.

The Federation's grievances were based upon the belief that the District violated the parties' CBA when it failed to notify the grievants (teachers) of their change in assignments by May 1, 2004 and that the District then involuntarily reassigned these teachers without requisite "unusual circumstances" being present. The Feceration further maintains that the CBA is susceptible to an interpretation that covers the dispute and that the merits of its grievances may therefore be arbitrated.

An evidentiary hearing was convened at the offices of the Public Employee Labor Relations Board in Concord on February 10, 2005 at which Ms. Gaul represented the Federation and Attorney Moran, the District. Each was provided the opportunity to present witnesses and exhibits and had the opportunity to cross-examine witnesses. The parties submitted "Mutual Statement of Facts" into the record and these appear below as #1- #15. Prior to the hearing on the merits of the unfair labor complaint the District requested *in limine* proceedings regarding the consideration of parole evidence (*i.e.* extrinsic evidence beyond the language actually used by the parties in their CBA) and also made a Motion for Summary Judgment on the basis that there was no issue of material fact in dispute between the parties. The Board first considered the District's Motion *In Limine* and then took the District's Motion for Summary Judgment and the Federation's objection under advisement and the hearing on the District's complaint proceeded on the merits. The Board has reviewed the parties' pleadings, has considered the evidence, has weighed the credibility of the witnesses and makes the following determinations, including additional findings of fact #16 - #22:

MUTUAL STATEMENT OF AGREED FACTS

1. The Hinsdale Federation of Teachers ("Federation") and the Hinsdale School District ("District") entered into a collective bargaining agreement ("CBA") for the period September 1, 2003 through August 31, 2006.

2. On May 21, 2004, the Federation filed a grievance seeking the following relief that "all teachers approached about a change in grade level assignments be allowed to remain in their present position if they desire".

3. On May 28, 2004 the Federation filed a grievance seeking the following relief, that: "Any teacher involuntarily re-assigned be allowed to remain at their present position if they desire".

4. Article V, Section F of the CBA provides as follows: "Except in unusual circumstances, teachers shall be notified of their teaching assignment on or before May 1, for the ensuing school year. Such notice shall include grade level and/or subject area as appropriate. No teacher shall be involuntarily re-assigned, except in unusual circumstances, (such as an enrollment change) which require(s) any such change. Any teacher who is involuntarily

reassigned shall be notified as soon as the district is aware of any such change and shall be provided with rationale in writing and be given an opportunity to discuss such change with the Principal and/or Superintendent. In any event, the Superintendent shall make the final determination and such action(s) shall not be subject to the grievance and arbitration provisions of the agreement. In the event that the teacher is unwilling to accept the change in assignment, he/she shall be released from his/her contract by the Board without prejudice."

5. In the responses to the grievances from the Superintendent dated June 3, 2004 and June 8, 2004, the Superintendent stated that the change in assignments is "not subject to the grievance or arbitration provisions of the agreement".

6. The response of the Hinsdale School Board dated June 22, 2004 referenced the Superintendent's response and stated that in any event the Superintendent shall make the final determination and such actions are not subject to the grievance and arbitration provisions of the agreement.

7. The Federation disagreed with the decision of the School Board and on June 28, 2004 the Federation filed a Demand for Arbitration at the American Arbitration Association seeking the following relief: (1) rescind transfers, (2) cease violation of CBA, (3) make employees whole for losses suffered.

8. In advance of the arbitration hearing being held, the District filed a Motion to Dismiss dated October 29, 2004, requesting that the arbitration be dismissed given that the Arbitrator had no jurisdiction to hear the matter. In the Motion to Dismiss, the District stated that the actions taken by the Superintendent were not subject to the grievance and arbitration provisions of the CBA and that the Arbitrator therefore had no jurisdiction to hear this matter.

9. By letter dated November 3, 2004, the Federation through its representative, UniServ Director Mary E. Gaul, stated that it was not appropriate to file a Motion to Dismiss with AAA and that the determination of arbitrability is not within the purview of the AAA. The letter stated that under the Voluntary Rules, there are no grounds for the AAA to dismiss a claim for arbitration.

10. On November 4, 2004 the District filed the pending Unfair Labor Practice ("ULP") with the Public Employee Labor Relations Board ("PELRB").

11. The District initially sought an *ex parte* temporary cease and desist order pursuant to RSA 273-A:6, III prohibiting the arbitration of the 's grievance before the AAA, pending the PELRB' s determination of arbitrability.

12. The District filed a Motion to Postpone the arbitration hearing on November 4, 2004 with the AAA on the basis of the pending action at the PELRB. The District requested that further arbitration proceedings be stayed pending the determination by the PELRB of the issue of arbitrability.

13. On November 5, 2004, the Arbitrator denied the District's Motion to Postpone.

14. On November 5, 2004 the Federation and the District entered into the following "Preliminary Determinations, Reservations and Agreements":

> The parties agreed to have the Arbitrator, in the first instance, hear and rule on the Board's Motion to Dismiss for lack of jurisdiction.
>
> The School Board reserved its right to challenge or appeal the Arbitrator's decision with respect to arbitrability at the New Hampshire PELRB or to proceed with the previously filed ULP after receipt of the Arbitrator's decision.
>
> The Union reserved its right to challenge or appeal the Arbitrator's decision without (sic) respect to arbitrability at the PELRB and/or answer any charges brought forward by the School Board. (The parties concur that this should read "with").
>
> Given that the Arbitrator denied the Board's Motion to Postpone the arbitration hearing, the parties agreed that the hearing would be bifurcated and the merits of the case would not be heard until such time as there is a final decision by the PELRB on the question of arbitrability, should either party request such decision from the PELRB.

15. On December 21,2004, the Arbitrator issued her decision, finding that the grievance was arbitrable.

16. The CBA, effective 1986-89, provides this previous language used by the parties in Article V, Section F, " Except in unusual circumstances, teachers will be notified of their teaching assignment on or before the last day of the academic school year for the ensuing year". (Federation/Assn Exhibit #1B)

17. The parties' negotiations for a successor contract to that existing for 1986-1989 included proposals and counterproposals that indicate the District initiated proposed new language addressing teacher reassignments in their proposal of 6/25/89, p.2. (Federation/Assn Exhibit #5).

18. In relevant part, the District's proposal was mutually agreed to by the parties and incorporated into the 1989-91 CBA with the exception of a change in the notification of teaching assignment date from June 1 to May 1 of the academic year. (Federation/Assn Exhibits #6 and #8).

19. The language relating to teacher assignment contained in Article V, Section F has continued in effect and been mutually agreed to by the parties as evidenced by their execution of successor CBA's since that time.

20. The new language was added to Article V, Section F in the 1989-91 CBA following an incident whereby several teachers were informed of reassignments on the last school day of the year.

21. The effective CBA Management Rights clause reserves to the District all "powers, directions and authorities which by law are vested in them, and [the CBA] shall not be construed so as to limit or impair their respective statutory powers, discretions and authorities." (See Article II, Section A, CBA 2002-2006)

22. The effective CBA Management Rights clause also provides that "[e]xcept as otherwise provided in this Agreement, or agreed to in writing between the parties....the supervision and direction of the staff are vested exclusively in the Board." (See Article II , Section A, CBA 2002-2006).

We specifically elect, pursuant to RSA 541-A:35, (See also *Appeal of New Hampshire Department of Employment Security*, 140 N.H. 703) not to make rulings on the separate requests for findings submitted by the District's counsel as they were neither required by the panel hearing this case nor are proposed rulings provided for in the Board's administrative rules.

DECISION AND ORDER

JURISDICTION

The PELRB has exclusive original jurisdiction over the question of whether or not a party to a dispute is entitled to submit an issue to arbitration where the parties have not specifically granted that authority to an arbitrator. (See Nashua School District v. Murray, 128 NH 417 at 419 (1986); Appeal of State, 147 NH 106 at 109 (2001). This is a threshold consideration commonly referred to within the labor relations field as "arbitrability." In this matter, the parties have not granted that authority to an arbitrator within the terms of their collective bargaining agreement (CBA) or any other writing in evidence. Without that specific reservation to an arbitrator, the PELRB generally assumes jurisdiction to refer the matter to arbitration or find that the Federation's request for arbitration constitutes a wrongful demand to use that forum and, thereby, constitutes the commission of an unfair labor practice.

Additionally in this specific instance, the parties previously reserved their right to seek a determination of arbitrability from the Board by entering specific reservation of rights agreement notwithstanding contemporaneous mutual participation in arbitration. It should be noted, that redundancy in pursuit of relief is not favored by the Board as it is an uneconomical use of limited

adjudicatory resources and can lead to conflicting opinions. Nevertheless, the Board applies its authority to resolve the issue for these parties as to whether this dispute is arbitrable based upon its primary jurisdiction and the parties agreement.

DISCUSSION

The petitioning District and responding Federation are parties to a series of collective bargaining agreements dating back at least to 1986 (Federation Exhibit #1A). The present agreement, and that under which the dispute between them has arisen between them, is effective for the period July 1, 2001 through June 30, 2005. The parties are in essential agreement regarding the material facts concerning the chronological history of the matter presently before us as reflected in the agreed submission of mutual facts as appear above.

At the outset, the Board is called upon to decide whether or not it will hear any testimony or review any documents other than the present collective bargaining agreement in deciding this matter in dispute between the parties. *In limine* proceedings initiated by the District requested that the Board limit its consideration of evidence to the parties' CBA. The Federation desired to enter into evidence certain other documents relating to previous agreements of the parties, and bargaining proposals exchanged by the parties prior to the execution of the present CBA expressing the disputed intent of the parties. In state administrative adjudicatory proceedings the formal rules of evidence are not applied. ADMIN. RULE PUB 203.02(e) (providing "[t]he formal rules of evidence shall not apply in adjudicative proceedings.; see also, RSA 541-A:33. The Board begins its evaluation of the necessity to consider extrinsic evidence grounded in that genesis, albeit a procedural consideration. This Board has a long history of liberally allowing evidence, including extrinsic evidence, to be admitted and then, in the full context of the proceedings, assigning such evidence appropriate weight. While the "parole evidence rule" may be said to be a substantive rule of law that would bar the introduction of extrinsic evidence in other forums, in labor relations generally and questions of the intent of the negotiators of collective bargaining agreements specifically the bar is placed at a low level over which passes much administrative adjudication. We do so because often the drafters of the final CBA's are not the persons who negotiated its terms and equally as often are not lawyers, because in considering collective bargaining agreements the parties' historical conduct ("past-practice") bears more heavily on the intent to be taken from the word usage of the parties, and because it is important to us to determine that the parties have not made a mutual mistake in expressing their collectively negotiated working term or condition in writing or assigned a special meaning to a word within the education community.

Therefore, we deny the District's request to bar all evidence, beyond the present CBA, from our consideration of the issue of whether the parties' dispute is required to be subject to arbitration. Both parties are permitted to present evidence that may be considered relevant to place the terms of Article V, Section F in full and complete context.

Before determining whether to consider the merits of the Federation's argument that the matter in dispute should be resolved through arbitration, the Board must make a decision on another preliminary motion filed by the District. It should be noted that the District's written

Motion for Summary Judgment was not filed until the scheduled hearing date. While the Board proceeded with its customary practice of not delaying a hearing on the merits for separate consideration of such motions, it finds that the Federation did not receive reasonable notice of the contents of the District's motion as the filing violated the letter and the spirit of a pre-hearing order, See Decision # 2004-192, requiring the District to file its motion at least twenty (20) days prior to the scheduled hearing on the merits.[1] The Board indicated at the time of hearing that it would take the District's Motion for Summary Judgment under advisement and allowed the Federation to respond, in writing, following the conclusion of the hearing. The Federation filed its objection to the motion on April 18, 2005.

Prior to conferring to consider the merits of the District's complaint of unfair labor practice against the Federation, it reviewed the parties' relevant pleadings and weighed all inferences properly drawn from them in a light most favorable to the Federation as required by law to decide whether or not a genuine issue of material fact exists. The Board indicated, by denying the District's motion *in limine* to attempt to bar evidence other than the contents of the present CBA, that it believed it was compelled to consider extrinsic evidence to determine whether or not the District was required to arbitrate the Federation's grievance dispute related to reassignment. In part this was to discern the sequence of any language change to Article V, Section F of the parties' CBA.

The majority of the Board finds that there is no genuine issue of material fact in opposition by the parties other than they disagree as to the effect of the language in the present CBA. They do not disagree as to the language they have previously relied upon, and presently rely upon as part of the 2002-2006 CBA. The majority also supports the District's interpretation as the only reasonably susceptible reading of the contents of the parties' CBA language appearing in both Articles V, Section F and Article II that address respectively reassignment authority and general management rights. The majority places substantial weight on the what it determines to be a management right unrestricted by either the statute or Article II and clearly and unambiguously excluded from the grievance procedure through the use of the words in Article V, Section F that, "[i]n any event, the Superintendent shall make the final determination and such action(s) shall not be subject to the grievance and arbitration provisions of the Agreement."

The so-called *Westmoreland* standard applied to this determination by the majority has been expressed and subsequently supported by court decisions. The majority believes that since it has found that the language in Article V, Section F, within the context of the entire CBA, and the parties' conduct clearly reserves the right to reassign teachers to the Superintendent, it likewise finds the language equally clear and sufficient for the majority to state with "positive assurance" that the parties intended to exclude this issue from arbitration and that an arbitrator does not have authority to rule on the matter of contract interpretation. (See Appeal of Westmoreland School Board, 132 N.H. 103, 105-106 (1989).

Therefore the majority, having examined even the extrinsic evidence offered by the parties, finds that there is no genuine issue of material fact in dispute between the parties. It has

[1] The merits were initially scheduled to be heard on February 10, 2005 and that hearing was continued for reasons of inclement weather. The District was to have filed its motion on or before January 21, 2005.

considered all of the evidence admitted into evidence and the legal arguments of the parties and hereby grants the District's Motion for Summary Judgment. The Federation, in attempting to compel the District to arbitrate an issue that the parties had agreed in their CBA was not subject to the grievance procedure, has violated RSA 273-A:5,II(F) in breaching the terms of the agreement. The Federation shall cease and desist from attempting to further arbitrate this issue and the parties are not subject to any arbitrator's award of this issue.

So ordered.

Signed this 2nd day of June, 2005

Doris M. Desautel

Doris M. Desautel, Alternate Chair

By majority vote: Alternate Chair Doris Desautel presiding with Board Member James M. O' Mara, Jr. voting with the majority.

DISSENT

I respectfully dissent from the decision of my colleagues in granting the District's Motion for Summary Judgment and preventing these parties from allowing an arbitrator to interpret the relevant provisions of their collective bargaining agreement. It appears to me that there is sufficient ambiguity in the language selected by the parties to express their mutual agreement on the issue of teacher reassignment. I give greater emphasis to other language in Article V, Section F that specifically relates to an individual teacher's rights related to reassignment. That language is included in the following statements:

> "No teacher shall be involuntarily re-assigned, except in unusual circumstances, (such as an enrollment change) which require(s) any such change. Any teacher who is involuntarily re-assigned shall be notified as soon as the district is aware of any such change and shall be provided with rationale in writing and be given an opportunity to discuss such change with the Principal and/or Superintendent."

Since these statements appear in Article V, Section F immediately preceding the language from which emanates what my colleagues believe is the clear intent of the parties, I maintain that the more balanced language, when the paragraph is considered as a whole, establishes conditions to the alleged autonomous authority of the Superintendent that obscures any clarity and creates ambiguity in the combined effect of the language chosen by the parties. This is supported, in part, by testimonial evidence by both parties that the driving reason for any additional language in this article was made necessary by an earlier incident of unilateral reassignments on the last day of a school year without notice and without the existence of unusual circumstances.

To join my colleagues of the majority would cause me to abandon my long felt belief that the strong presumption of arbitrability of all but the most clearly expressed management exclusions that finds support in the court's decision in *Appeal of Westmoreland, Id.* Specifically, the court states in that controlling case that,

> "under the 'positive assurance' standard when a CBA contains an arbitration clause, a presumption of arbitrability exists, and in the absence of any express provision excluding a particular grievance from arbitration,...only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."

I find neither a clear and unambiguous "express provision" nor "the most forceful" evidence in the record before us for the parties to escape the alternative dispute resolution mechanism of arbitration that has contributed to labor harmony in this state since the inception of our statute. I believe further that either of the parties' positions regarding the language at issue is susceptible to a reasonable reading of their intent. Therefore, while I join the majority in denying the District's Motion *in Limine* to bar extrinsic evidence, I would neither grant the District's Motion for Summary Judgment nor find the Federation to have committed an unfair labor practice in violation of RSA 273-A:5, II. Instead, I would deny the original complaint of the District and order these parties to arbitration on the subject grievances.

Signed: E. Vincent Hall

E. Vincent Hall, Member

Distribution:
Mary E. Gaul, UniServ Director
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